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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 980

AKIN DISTRIBUTORS, INC.,
a Florida corporation,
Appellant,

vs.

UNITED STATES OF AMERICA.
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Akin Distributors Inc. of Florida, a Florida Corporation, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on the 29th day of July, 1968 wherein the Petition for Rehearing was denied December 11, 1968.

OPINIONS BELOW

This petition seeks a review of the judgment of the Court of Appeals for the Fifth Circuit (Appendix page A1) which affirmed the judgment of the United States District Court for the Middle District of Florida (Appendix page A3).

JURISDICTION

The judgment petitioned from was entered July 29, 1968 and Petition for Rehearing thereon was denied December 11, 1968. This Petition is being filed within the time limit as extended to February 9, 1969. Jurisdiction of the Court is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Did the Trial Court err in its refusal to sustain the Petitioner's Motion to Elect?

2. Did the Trial Court err in its refusal to suppress the evidence of the government for the following reasons:

   (a) The entry into the Petitioner's warehouse was unlawful.

   (b) The search of the Petitioner's warehouse was without free consent of Petitioner.

   (c) The search of Petitioner's warehouse was unlawful in absence of a search warrant and in violation of the Fourth Amendment of the Constitution of the United States of America.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition for Certiorari involves primarily the Fourth Amendment of the Constitution of the United States which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Further the constitutionality of 21 USC § 374 (a) is questioned, said section providing in part as follows:

> "For purposes of enforcement of this chapter, officers or employees duly designated by the secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. . . .—"

Another statute involved in this Petition for Certiorari is 21 USC § 331 (k) which provides as follows:

> "The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other *act* with respect to a food, drug, device or cosmetic, if such *act* is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

Also 21 USC § 331 (f) is questioned as constitutional, said section providing as follows:

> "The refusal to permit entry or inspection as authorized by Section 374 of this title."

STATEMENT OF THE CASE

For convenience of the Court, the parties will be referred to as they appeared in the Trial Court, the Plaintiff being the Government, United States of America, the De-

fendant being Akin Distributors of Florida, Inc., a Florida corporation.

The Defendant is a Florida corporation which is engaging in the wholesale distribution of foods and operates a warehouse for storage and distribution and receiving of said foods for eventual sale to the retail market. It is undisputed that the Defendant not only ships foods in interstate commerce, but also receives foods after shipment in interstate commerce holding the same for sale. On March 15, 1967, information was filed in the United States District Court for the Middle District of Florida wherein the Defendant was charged under four counts of violating Title 21 USC § 331 (k).

In response thereto, the Defendant filed a Motion to Elect wherein the Government was requested to elect as to which count the Defendant would be prosecuted upon. Following oral argument, the Motion was over-ruled. The Defendant then filed a Motion to Suppress Evidence, a Motion for Return of Property, and on August 17, 1967 a hearing was conducted relating to the Defendant's Motion to Suppress Evidence and Motion for Return of Property. The Motion to Suppress Evidence and Motion for Return of Property were denied by the Court.

The case was then tried before the Trial Court, both sides having waived jury, and a verdict of guilty upon all four counts was handed down by the Court on the 3rd day of October, 1967. A Motion for New Trial was filed October 12, 1967 and on November 9, 1967, Judgment and Order of Fine was assessed against the Defendant in the sum of $500.00 upon each count for a total fine of $2,000.00. Notice of Appeal was filed November 16, 1967 and appeal perfected and argued before the United States Court of Appeals for the Fifth Circuit. On July 29, 1968 the Judg-

ment of the Trial Court was affirmed by the United States Court of Appeals for the Fifth Circuit in a very brief opinion wherein it was held that the four counts of the information were not duplicitous since each count involved a different food. As to the Defendant's contention that the evidence was a fruit of an illegal entry and search, the Court determined that the Defendant's agent consented to the search and that said consent was free and voluntary.

The manager of the Defendant's warehouse and the only person on the premises vested with any authority over the premises was Dale Wensell. There was no other person who had been designated to have any authority over the management of the company at the warehouse (Record page 81). On July 5, Mr. Wensell went into Jacksonville, Florida, shortly before lunch to attend to some business and informed his secretary he would be returning that day. Mr. Wensell, in fact, returned to the warehouse shortly after closing time, and in his absence did not designate any authority to any other person to assume the management duties of the warehouse (Record page 87).

At 2:00 p.m., that day, agents of the Food and Drug Administration knocked on the door of the warehouse, and Gerald Council opened the door whereupon said agents served a notice upon Mr. Council of their intent to inspect the premises, a copy of said note having been marked Defendant's Exhibit A (Record page 265). The notice shows that it was served upon Jerry N. Council "Foreman". The inspectors then proceeded to fish throughout the entire warehouse and located some adulterated food in two refrigerator rooms in the warehouse. It is worthy to note that these refrigerator rooms had broken down the week previously and the Defendant was having difficulty in obtaining parts to repair the compressor. The doors were cracked open to keep the contents cool, and it was on the

first day of the inspection that the agents found the adulterated food in the two locker rooms concerned. The agents testified they returned the second day when Mr. Wensell was there, but they did not serve a notice of inspection upon him; that the entire three day inspection of said warehouse was one continuous inspection based upon the original notice as served upon Council. The adulterated food, it must be noted, was found on the first day of inspection after the agents had been given permission to enter by Gerald Council, a mere shipping clerk.

Mr. Council was an assembling clerk or shipping clerk, and did not have any managerial authority whatsoever. He did not have the authority to hire or fire, and he had no authority over the plant while Mr. Wensell was absent. He also had never been designated or given any express authority to admit agents of the Food and Drug Administration when they presented the notice for inspection (Record pages 82 and 83). Mr. Wensell specifically states that on the day that he left to go to Jacksonville, and on the day of the inspection, he did not designate authority to Mr. Council to allow anyone to gain entry to the warehouse and search the premises for crimes (Record page 87). He also states that he has never granted such authority to Mr. Council and states that Mr. Council is not a Plant Foreman but was merely an employee of the company.

The information bases its four counts on the basis of different brands of food being held after shipment in interstate commerce and being adulterated. Under Counts I, II, III and IV, the allegations are that the foods were received between the periods from or about January 1. 1966 to on or about July 5, 1966. This does not vary from count to count, but count I is based upon the receipt of food from Akin Distributors of Tulsa, Oklahoma, labeled

"Esculent Whole Wheat Flour, Net Weight 25 lb., Packaged by Akin Distributors, Box 2658 Tulsa, Oklahoma." Count II is based upon "Esculent Unbleached White Flour, Net Weight 25 lb., Packaged by Akin Distributors, Box 2658, Tulsa, Oklahoma". Count III is based upon "100 lbs. Net, General Mills, Inc. Wheat Germ Meal Type A, Minneapolis, Minnesota." Count IV is based upon "El Molino Best Soya Flour 25 lbs. Net Wt., El Molino Mills, Alhambra, Calif."

It is evident that the government bases as the element of the offense not the number of packages which were adulterated, not the pounds, not the number of grains, granules, or other division of quantity or quality, but bases the element of offense upon the respective brands of food adulterated.

REASONS WHY THE WRIT SHOULD BE GRANTED

Under the questions that will be hereinafter presented to this Court, Petitioner feels that a Writ of Certiorari should issue for the reason that the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, and has further decided an important question of Federal law which has not been but should be settled by this Court, and further has decided a federal question in a way in conflict with applicable previous decisions of this Honorable Court.

Question 1: It is contended that the Trial Court committed error in refusing to sustain the Defendant's Motion to Elect as to Between the Four Counts contained in the information. As heretofore stated, it is seen that each count is based upon a different food. The Defendant received between January 1, 1966 and July 5, 1966, four separate products of foods which were stored in two ad-

joining refrigeration rooms. The refrigerated compressors broke down and the four products became adulterated. There were four foods adulterated by one single, continuous act. Proof of one would apply to all. Counts I, II, III, and IV a.. identical in that (1) They all charge a violation of 21 USC § 331 (k) which prohibits the holding of foods previously shipped in interstate commerce for sale. (2) That the period of contamination was between January 1, 1966 to July 5, 1966, and the shipments were made during this period. (3) That all products were exposed to contamination in two adjoining refrigerator rooms.

Counts I and II allege foods that were shipped during said period from Akin Distributors Inc. of Tulsa, Oklahoma; Count III alleges the foods shipped from General Mills Inc. and Count IV alleges the food shipped from El Molino Mills. The shipping of the foods are not contended or asserted as violations. The gravamen of the offense is the act of holding contaminated foods for sale.

There are four counts. The act complained of is one continuous act. The counts present different phases of it. There could only be one sentence for only one violation.

Duplicity may be applied only to the result charged and not to the method of its attainment. Duplicity in an indictment means the charging of a single offense committed in more than one way. The result of the refrigeration failure was the food becoming contaminated by having to open the doors and the temperature becoming elevated. If the room contained five thousand different products then conceivably the government could charge five thousand counts which is *reductio ad absurdum.* The charging of four counts is likewise absurd.

In the absence of a direct congressional mandate, there cannot arise the imposition of multiple sentences.

A leading authority on this subject which relates to the Mann Act is *Bell* v. *United States,* 349 U.S. 81. Mr. Bell committed the indiscretion of having two prostitutes in his car as he drove across the state line. He was charged and sentenced on two counts. The violation occurred during one trip in a single vehicle. The Mann Act is silent as to "what Congress has made the allowable unit of prosecution". In the face of silence as to the expressed intent of Congress, the following rule applies:

> "When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity . . . It may fairly be said to be a presumption of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. . . ."

The Court held that doubt will be resolved against turning a single transaction into multiple offenses. The case was reversed.

In *Ladner* v. *United States,* 358 U.S. 169, the petitioner was convicted of assaulting two federal officers with a deadly weapon and sentenced to ten years on each of two counts. He had fired a single shot and the shotgun pellets wounded the two officers. *Bell* v. *United States,* supra, was construed. The question was whether Congress meant a separate offense for each officer or for one discharge of the shotgun.

The Court observed that if one pointed a gun at one officer he is punishable for ten years, but if he points a gun at five officers he is punishable for 50 years. The Court held the single shot constituted an "assault" without regard to the number of federal officers.

> "Neither the wording of the statute nor its legislative history points clearly to either meaning. In the circumstance the Court applies the policy of lenity and adopts a less harsh meaning . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer Congress can make that meaning clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation of Section 254. . . ."

See also *In re Snow,* 120 U.S. 274, where a Mormon who had seven wives was tried for three offenses of "cohabitating with more than one woman". One trial was for the year 1885, the other two for 1883, and 1884, respectively. The Court held that the act was continuous, and if the period of an offense could be subdivided by the prosecution, why not prosecute for days and weeks, etc. Lord Mansfield construed parliamentary intent to mean selling bread to four people on Sunday wasn't four offenses, but only one per Sunday because of the inherent continuous nature of "doing business". See also *Castle* v. *United States,* 368 U.S. 13, where Castle transported in one envelope five forged money orders across a state line in violation of the National Stolen Property Act. The Fifth Circuit affirmed a multiple conviction, but Attorney General Cox acquiesced in the applicability of the Bell case and the excess convictions were vacated and reduced to one sentence.

The intent of Congress is not expressed in Section 301 (k) as to what the unit of violation is. The government attempts to establish the unit of violation as being each article adulterated rather than the "doing of any other

act" with respect to food which results in its being adulterated. Section 301 (k) of the Federal Food, Drug and Cosmetic Act prohibits the "alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated or misbranded."

The language of Section 301 (k) unambiguously defines two distinct offenses with respect to food held for sale after interstate shipment. As originally enacted in 1938, the subsection prohibited the alteration, mutilation, destruction, obliteration, or removal of the label, or the "doing of any other act" with respect to the product which "results in such article being misbranded". This section was amended in 1948 to prohibit additionally "the doing of any other act" with respect to the product which "results in such article being adulterated." The acts specifically enumerated in the original enactment relate to the offense of misbranding through labeling or the lack thereof. The separate offense of adulteration, on the other hand, is concerned solely with deterioration or contamination of the commodity itself. An interpretation of this statute is set forth in *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, the Court held:

> "For the most part, acts resulting in misbranding and acts resulting in adulteration are wholly distinct. Consequently, since the enumerated label defacing offenses bear no textual or logical relation to the scope of the general language condemning acts of product adulteration, application of the rule of the ejusdem generis to limit the words 'the doing of any other act' resulting in product adulteration in Section 301 (k) to acts of the same general character as those specifically enumerated with respect to misbranding is wholly inappropriate."

And the Supreme Court then resorted to legislative history wherein Congress intended to proscribe the particular conduct charged in the Information filed in the Court below (the Middle District of Florida)—the holding of food under insanitary conditions whereby it may have become contaminated. The House Committee report was quoted wherein it was noted that the amended section would penalize, among other acts, resulting in adulteration or misbranding, the *act* of holding articles under insanitary conditions whereby they may become contaminated with filth or rendered injurious to the health. It was stated in the footnote to the case that during the Senate hearings on the amendment the Associate Commissioner of Food and Drugs explained that "under the bill as enacted here, if there was a definite showing of violation on the part of the warehouse which had this material stored, a prosecution of them criminally for doing the 'act' of holding under these insanitary conditions which result in adulteration could ensue."

The Supreme Court noted that Section 301 (k) prohibits "any . . . act which results in adulteration of the product." The Court held that Section 301 (k) read together with the definition of food adulteration contained in § 402 (a) (4), gives ample warning that the holding or storing of food under insanitary conditions whereby it may have become contaminated is prohibited. Therefore, we can see from this, that the Supreme Court is defining the element or unit of offense as any act which results in adulteration. In other words, Section 301 (k) prohibits an act which results in misbranding and also prohibits the act of holding food under insanitary conditions whereby it may become contaminated and adulterated.

The Information in this case has filed charges under four counts for one single offense which resulted in four

separate brand names of food becoming adulterated. It is our contention, upon reading *Bell* v. *United States,* supra, that the unit of the offense is the act of holding or doing of any act which results in an article or articles in the warehouse held for sale becoming adulterated.

The holding of food in a warehouse is a continuous act under the evidence in the case and under the Information. Congress has not seen fit to describe the element of offense as being the number of days, the quantity of articles, or anything else. It uses the singular term "act" as the element of offense, and we believe that the lower court erred in refusing to sustain the defendant's Motion to Elect. We believe that the intent of Congress is further indicated in the penal section in that for each offense the fine is $1,000 and upon a second conviction the fine is elevated to $10,000.

Dozens of cases are available from this country's highest authority to the effect that where the intent of Congress is absent, that absent a clear mandate of Congress affording ground for multiple prosecutions, the rule of lenity will apply. Here we have a defendant who stored several bags of food in two adjoining disabled refrigerator rooms and they became adulterated. The government selects four sources of the bags and asks for four sentences at a maximum of $1,000 each. Yet there was a single act, a continuous act of holding as violation provable by the same evidence. What the statute seeks to prohibit is a course of conduct, i.e., holding adulterated food for sale after receipt in interstate commerce. Its source in interstate commerce is irrelevant. All that is required is that the food so held had its source from interstate commerce. We are fortunate the government is not prosecuting for each bag, or each pound, package, granule, gram, or any other segmented element of offense to be arbitrarily se-

lected. We believe the Court erred in refusing to sustain the defendant's Motion to Elect and requiring that the four counts as charged be reduced to one single count. We pray that this Honorable Court apply the rule of lenity.

Question II: We submit that the trial court erred in its refusal to suppress the evidence of the government and return the seized property to the defendant.

A. The entry into defendant's warehouse was unlawful.

21 U.S.C. § 374 requires written notice to be given to an authorized person before entrance to the premises. A copy of the notice in question can be found at page 265 of the record. It is to be noted that in this case the required notice was served upon "Jerry N. Council, Foreman". Clearly on the face of the Notice Mr. Council was neither an owner, operator, or agent in charge of Akin Distributors of Florida, Inc., and the evidence so shows. However, a case which is on all fours with the case at bar is *U. S.* v. *Maryland Baking Co.*, 81 F. Supp. 560 (N.D. Georgia 1948). In that case the plant superintendent was not authorized to consent to a search but said "go ahead" or "all right" assuming officers had a right to search on one day, and the officers came back the next day. The superintendent was neither "operator or custodian" under Section 374 and since the agents did not obtain proper consent (1) the search was improper and (2) the several inspections were all a continuation of the initiatory one which was held in that case to be illegal. We submit the evidence before the trial court was clear that Gerald Council held a position as shipping clerk and "thought" he was a warehouse foreman and "assumed" that he had the authority to consent for the corporation to a search and seizure. We direct the Court's attention to pages 82 through 83, 87 through 88, 89, 91, 94 through 95, 112

through 113, 118 through 119, 120 through 121, 124 through 125, and 135 for source of the evidence relied upon by the government to establish Mr. Council's authority to consent to the search and seizure.

We submit from the testimony elicited before the trial court it was clear that this case should have been governed by the authority of *U. S.* v. *Maryland Baking Co.*, supra, and that the trial court should have ruled that the search was improper and that the several inspections were all a continuation of the initiatory one where Mr. Council was served with a perfunctory, void notice of inspection and that the agents unlawfully entered the warehouse of the defendant without proper authority of law and conducted a fishing expedition, searching for crimes at the expense of this defendant.

We submit that the search of the defendant's warehouse was without the consent of the defendant.

B. The search was without consent of the defendant.

The cases are very clear that consent to search under the Constitution must be given by a person in authority to do so. In *Stoner* v. *California,* 376 U.S. 483, officers obtained consent to search a hotel room from a desk clerk. It was held as follows:

> 1. Even assuming state law gave the clerk a right to enter the defendant's room, rights protected by the Fourth Amendment are not eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority"
>
> 2. It is ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law in evolving the body of private property law, which, more than almost any

other branch of law, has been shaped by distinctions whose validity is largely historical. We ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedure protections accorded to those charged with crime.

3. It was petitioner's right at stake and not the night clerk's or the hotel's. Only the petitioner could waive that right. See also Lustig v. U. S., 338 U.S. 74; U.S. v. Jeffers, 342 U.S. 48.

A wife cannot waive her husband's constitutional rights and when the wife admitted federal officers into her home to search for evidence of the husband's crime, the motion to suppress was sustained. *Amos* v. *U. S.*, 255 U.S. 313. Even a mother-in-law cannot waive for the unfortunate son-in-law. *U. S.* v. *Sully*, 56 F. Supp. 942 (D.C. New York 1944).

There is no effectual consent to a search and seizure which will bind an owner or occupant of premises, where another, in charge of the premises in his absence is impliedly coerced to allow an officer to enter and make a search. Submission to lawful authority in such a case does not arise to the dignity of the consent. See *Amos* v. *U. S.*, supra, where Government officers told the wife they were under Government authority. It was held in that case that there was implied coercion and no waiver was intended or effected to permit such a search.

See also *Fitter* v. *U. S.*, 258 Fed. 567, where U. S. Secret Service Agents came to the defendant's place of business and demanded that the wife allow them to search. The search was held unlawful even in the light of the wife's consent. See also *Pekar* v. *U. S.*, 315 F.2d 315. This is a Florida case where FBI agents went to a man's room and said "I want to talk to you regarding an official investiga-

tion of the FBI". The defendant opened the door and they walked in. The Court held as follows:

> "It is clear that in absence of a search or arrest warrant the premises of a person may be searched if there has been given to authorities a free and voluntary consent that they may do so. But it is equally clear that if this consent is obtained by use of force or pressure, or where superior authority had any place in the obtaining of the consent, the consent is no consent at all, and the constitutional guarantees against unreasonable searches and seizures have been violated."

See also *Canida* v. *U. S.*, 250 F.2d 822 (5th C.A. 1958), for a situation of disparity of position such as that of a Government agent and defendant.

In other words the rule of the Fifth Circuit is as follows:

> "No sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that words or signs of acquiescence in the search accompanied by denial or guilt do not show consent, at least in the absence of some extraordinary circumstance such as ignorance that contraband was present."

There can be no doubt that Gerald Council did not have the authority to consent for the defendant to a search and seizure of its property. Also subsequent searches by the federal agents even in the presence of Mr. Wensell, are illegal under *U. S.* v. *Maryland Baking Company*, supra, for the reason that the Notice for Inspection was served on Mr. Council and not upon Mr. Wensell. It is also important to note that the contraband which was seized herein in evidence of this case were discovered on the first day of the fishing expedition, an administrative search for crimes.

There can be no doubt that whenever a Food and Drug Agent presents himself at a warehouse, there is coercion to obtain the consent to search. For instance under Section 374 it is provided that upon presenting appropriate credentials and a written notice to the owner, operator or agent in charge, Government agents are "authorized" to enter and to inspect. In other words they are authorized to enter and fish and search for crimes. Section 331 (f) provides that it is a crime to refuse to allow an inspection under Section 374 and Section 333 provides that any person who violates that section shall be subject to imprisonment for not more than one year or fine of not more than $1000 or both, and upon a previous conviction he shall be subject to imprisonment for not more than two years or fine of not more than $10,000 or both.

Aside from that gentle coercion, Section 374 has been held too vague for judicial enforcement. See *U. S.* v. *Cardiff*, 344 U.S. 174, where it was held:

> "It makes inspection dependent on consent and it makes refusal to allow inspection a crime."
>
> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited."
>
> "We cannot sanction taking a man by the heels for refusing to grant permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice."

This section has been impliedly held unconstitutional in the case of *U. S. v. Stanack Sales Co.*, 387 F.2d 849 (3rd C.A. 1968). In that case the appellants were charged and convicted by a jury on two counts of violating 21 U.S.C. § 331 (f) which makes it unlawful to refuse to permit a

drug-factory inspection as authorized by 21 U.S.C. § 374. Stanack Sales is a family corporation in the business of repackaging prescription drugs. On a day certain a drug inspector by the name of Scharf presented himself at the appellant's premises, and it appeared on the surface that the visit was nothing more than a routine inspection. Scharf presented his credentials to Stanley Ackerman, who was the only person of authority on the premises and also served Mr. Ackerman with a written notice of inspection. Mr. Ackerman permitted Scharf to enter the establishment, who then began the inspection at which time another Ackerman arrived. An examination of drugs on the Stanack shelves caused Scharf to suspect that Stanack Company and the Ackermans were guilty of misbranding prescription drugs and brought a request from Scharf to inspect the company's records as to the receipt and distribution of the drugs. Although there was some friction between the two Ackermans as to whether the inspection should be permitted, Howard Ackerman informed Scharf that the requested information appeared only on records which contained financial data which Scharf had no authority to inspect. It was disputed whether Scharf informed the appellants their refusal constituted a violation of the law, but Scharf was permitted to take labels from the premises. On a following Monday Scharf again returned accompanied by another inspector, Symanski, in an effort to again obtain access to the receipt and distribution records. The requests were then refused and the refusals on November 19 and 23 constituted the grounds for the criminal Information convictions and appeals which were before the Third Circuit. The Court cited the recent case of *Camara* v. *Municipal Court*, 387 U.S. 523, to the effect that a homeowner could refuse to permit a search of his premises pursuant to an administrative regulatory code unless the administrative inspector first procured a search warrant and that the

homeowner could not be prosecuted for such a refusal. *Frank* v. *Maryland,* 359 U.S. 360, was pro tonto overruled. Business establishments were also covered by the new protection of *Camara* v. *Municipal Court,* supra, in the case of *See* v. *City of Seattle,* 387 U.S. 541. The Court, citing *See* v. *City of Seattle,* supra, observed that the administrative agency has a right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must limit the confines of a search by designated and needed documents and a formal subpoena. In addition, while a demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply. The Court reversed the conviction finding that no waiver of rights under the Fourth Amendment could be found. The Court stated the following authority at Page 853 as follows:

> "It is clear that the constitutional protection against unreasonable search and seizure can be waived. Perlman v. United States, 247 U.S. 7, 38 S. Ct. 417, 62 L. Ed. 950 (1918). However, the waiver must be clear and intentional. Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965), Certiorari denied, 385 U.S. 826, 87 S. Ct. 58, 17 L. Ed. 2d 62 (1966). We should hesitate to find a waiver, particularly where circumstances make it unclear whether the area searched was covered by the consent. Karwicki v. United States, 55 F.2d 225 (4th Cir. 1932). The facts in Karwicki are most apposite and establish that no waiver may be found in the case at bar."

In footnote 11 at page 853 of the Opinion, concerning waiver, the Court also held § 374 suspect of constitutionality and treated the question of waiver as follows:

> "We note that in the case before us, as in Camara and See, supra, we are dealing with a conviction under a statute which makes it unlawful to refuse to allow entrance to administrative agents seeking to perform a regulatory search. We are not here concerned with the question of evidence obtained by an unconstitutional search should be excluded from criminal proceedings under Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). In the case at bar we are faced with the constitutionality of the authorizing statute itself. Of course, if the statute could be reasonably construed to authorize a constitutional result, we would so construe it; however, we find no such alternative available."

We feel that by implication this case has declared Section 374 unconstitutional because no constitutional result from its enforcement could be possibly construed. Thus comes the heart of the matter.

In an administrative "hip pocket" search of premises such as occurred here, the notice of inspection is in some respects like a search warrant. The inspectors identify themselves and proceed to search the premises pursuant to their purported authority. A search warrant, with its supporting affidavit, must pass the scrutiny of a judge or magistrate before issuance. Unlike a search warrant, these notices of inspections are issued at the sole discretion of a government employee without any judicial supervision.

The inspectors in this case made the administrative search of the defendant's premises without first procuring a search warrant all of which is in violation of the defendant's rights against unreasonable search under the provisions and interpretations of the Fourth Amendment to the Constitution.

We submit that the Fifth Circuit holding in this case at bar is in direct conflict with the *U. S. A.* v. *Stanack Sales*

case, supra, in that the Stanack case does not approve of waiver of search and seizure rights under the Fourth Amendment to the Constitution in light of a regulatory search statute which makes it a crime to refuse to consent to such a search. The Fifth Circuit decision finds even in the face of such a statute, that consent can be construed in the force of apparent authority, and the fear of possible criminal prosecution does not enter into the Court's consideration as to whether or not there was a free and intentional consent given. We feel that in the light of the criminal sanctions for refusal to allow agents of the Food and Drug Administration to search a warehouse, that there can never be any free and intentional consent or waiver of constitutional rights under the Fourth Amendment.

In the case of *Canida* v. *United States of America,* 250 F.2d 822 (5th C.A. 1958), claim of error was made that the evidence obtained by a search of defendant's premises without a warrant was inadmissable and the appellant scouts the claim of the Government that, confronted by a persistent and insistent federal officer's demanding of her a written consent to search her premises, which consent she steadfastly refused, appellant's action in not further and forcibly indicating her dissent amounted to her freely and voluntarily inviting them to enter her home and the business premises where she worked and make a search thereof. The Fifth Circuit held:

> "As to the claimed consent to search, while it is true that really free and voluntary consent to a search is sufficient to justify it, Calhoun v. United States, 5 Cir., 172 F.2d 457, it is equally well settled that a consent which is not so given or in the obtaining of which the assertion of force and pressure or of superior authority had any place is violative of the Constitutional protection. Especially is this the case in situations of this kind, involving such a disparity of position as that of the government agent and this humble defendant.

> Here, after failing to induce or force her to sign a consent, the agents, after consulting with superior authority and getting backing for their forcing their way in, proceeded with the search under the wholly untenable claim that, though they had been unable to get her to agree in writing to consent, they had obtained her free and voluntary oral consent, in short her invitation to enter her home and search it out."

The Court thereupon reversed and remanded the case because the evidence obtained by the Government was inadmissible and found that no consent was freely given by the defendant because of the assertion of force and pressure or the superior authority and disparity of position as between a Government Agent and the defendant.

In *Pekar* v. *United States*, 315 F.2d 319 (5th C.A. 1963), the case was reversed and remanded for new trial also for the reason that the trial court failed to exclude from evidence the articles of personal belongings that were discovered by Federal investigative agents while in the appellant's hotel room which they visited and discovered without a search and an arrest. The facts of the case were that upon arrival outside of the defendant's room agents of the FBI knocked on the door and the defendant answered, "Who is there?" to which Beale replied, "I want to talk to you regarding an official investigation of the FBI". The defendant declined to answer and the agents waited outside the door for ten minutes and again asked the same questions. After some colloquy the defendant opened the door and the agents walked in displaying their credentials. Upon entering, the agents observed some luggage, trunks and suitcases, some opened and some closed, and men's, women's and children's clothing piled up in the room and hanging in the closet. The agents asked the defendant if these things belonged to him, to which he replied "no". They also asked defendant if he minded if "we look

around" and he said "no". Beale, the FBI Agent, said that on two occasions they presented the defendant with a form of waiver of a search warrant and that the defendant refused to sign it. The Court held in reversing the case as follows:

> "It is clear that in the absence of a search or arrest warrant the premises of a person may be searched if there has been given to the authorities a free and voluntary consent that they may do so." *Calhoun* v. *United States,* 172 F.2d 457, 5th Cir.
>
> "But it is equally clear that if this consent is obtained by the use of force or pressure, or where superior authority had any place in the obtaining of the consent, the consent is no consent at all, and the Constitutional guarantees against unreasonable searches and seizures have been violated." *Canida* v. *United States,* 250 F.2d 822, 5th Cir.

The Fifth Circuit also stated in *Ray* v. *United States,* 84 F.2d 654, 656 (5th C.A. 1936), in emphasizing the inviolability of the home:

> "In respect of homes, the constitutional provision against unreasonable searches and seizures may not be relaxed to find volitional, acts which evidence leaves no doubt were, if not expressly, impliedly coerced."

The case also cited *Judd* v. *United States,* 89 U.S. App. D.C. 64, as follows:

> "Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of the small-time criminal. But, however it be characterized, it hardly establishes willing agreement that the officers search the household without first procuring a warrant. Comparable statements have been held insufficient where the victim of the search was safely in his home . . ." 190 F.2d 651.

The Fifth Circuit therefore found that the defendant was impliedly coerced into submitting to the search of his hotel room. The record indicated that the defendant did not want the agents to enter his room and it was only after their persistent efforts that he let them in. The Court took into consideration the fact that the defendant waited ten minutes to let them; secondly took into consideration his refusal to sign a search warrant and further the Court took into consideration the cases cited which require the conclusion that the agent's superior position to that of the confused defendant was the motivating force behind defendant's opening the door and allowing the agents to "look around" once they were inside. The additional circumstance that convinced the Court that the defendant did not freely and voluntarily consent to the search of his room was that the agents merely told the defendant, when he asked what they wanted, that they wanted to talk to him about an investigation, not that they wanted to search his room, which they did in order to substantiate their meager suspicion gotten from a limousine driver. A case cited in *Pekar* v. *United States,* supra, is *Higgins* v. *United States,* 209 F.2d 819 (C.A. D.C. 1953). In that case the appellant was convicted of unlawfully possessing marijuana, and the case was reversed for the reason that the record did not support a finding that the defendant had consented to a search of his room without a warrant. At the hearing on the Motion to Suppress a police sergeant testified that he identified himself as a police officer and asked if he couldn't talk to the defendant in his room. The defendant stated that was all right and asked the police officer into his room. The defendant denied that he was engaged in any narcotic drug traffic, and the police officer then asked if he could look around. The defendant stated that the police officer could look around, was perfectly welcome to look anywhere in his room that he wanted to.

The Court bent over backwards and assumed for the purposes of the case that the officer's testimony was true and any of the testimony given by the appellant was false. Even upon that assumption the Court found that the record did not support a finding that the appellant consented to the search and found that the Motion to Suppress should have been granted. The Court held as follows:

> "But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room and find contraband in it, the occupant's words or signals of acquiescence in the search, accompanied by denial of guilt, do not show consent; at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present. No such circumstance is shown here."
>
> "The Court quoted Johnson v. United States, 333 U.S. 10. In that case a policeman knocked on a door and a voice inside asked who was there. 'Lt. Belland' was the reply. There was a slight delay, some shuffling or noise in the room and the defendant opened the door. The officer said 'I want to talk to you a little bit'. She then, as he describes it 'stepped back acquiescently and admitted us'. The Supreme Court held that the search which followed was unlawful and the evidence seized should have been suppressed. The Court said 'entry to defendant's living quarters which was the beginning of the search was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a Constitutional right'."

There can be no doubt that luckless owners of warehouses which store foods are constantly under the gun of disparity of position and exercise of superior authority when Agents of the Food and Drug Administration present themselves for a "routine factory inspection." 21 U.S.C. § 374 provides as follows:

> "(a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness."

This section has been held too vague for judicial enforcement for the reason that it makes inspection dependent upon consent and makes refusal to allow an inspection a crime. In *U. S.* v. *Cardiff*, 344 U.S. 174, it was said:

> "The vice of vagueness in criminal statutes is a treachery they conceal either in determining what persons are included or what acts are prohibited."

There can be no dispute that whenever the Agents of the Food and Drug Administration entered the defendant's warehouse for inspection, they were doing so under an administrative search and seizure warrant which was not subject to judicial scrutiny before its issuance. There can be no doubt that it is a fishing expedition and is violative of the Fourth Amendment of the Constitution. There can be no doubt that the consent to allow such an inspec-

tion is not voluntary for the reason that any person who violates Section 374 by refusal to allow the Agents to inspect a warehouse is liable for the prosecution of a crime which calls for a fine of not more than $1,000 or one year imprisonment, or both, and upon a second conviction the fine goes up to an astronomical figure of $10,000.

C. The search was unlawful in absence of a search warrant, and § 374 is unconstitutional.

Section 374 allows a search for crimes rather than an inspection of warehouses. It is violative of the Fourth Amendment of the Constitution, but up to a while ago would not have been violative because of the case authority found in *Frank* v. *Maryland*, 359 U.S. 360 (1959), where in a five to four decision the Supreme Court of the United States gave recognition to the unique character of these governmental administrative inspection programs by refusing to require search warrants. Finally, after years of governmental oppression, the Supreme Court of the United States handed down two landmark decisions which hold that administrative searches, of the kind at issue here, are significant intrusions upon the interests protected by the Fourth Amendment and that such searches, when authorized and conducted without a warrant procedure, lacked the traditional safeguards of the Fourth Amendment. The case of *Frank* v. *Maryland*, supra, was overruled and set aside. In the first landmark decision, *Camara* v. *Municipal Court*, 18 L. Ed. 2d 930 (1967), the appellant brought the action in a California Superior Court alleging that he was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence, and that a writ of prohibition should issue to the Criminal Court because the ordinance authorizing such inspections is unconstitutional on its face. The Superior Court denied the

writ, the District Court of Appeal affirmed, and the Supreme Court of California denied a petition for hearing. On November 6, 1963, an inspector of the division of housing inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of the City's housing code. The building's manager informed the inspector that appellant, lessee of the ground floor, was using the rear of his leasehold as a personal residence. Claiming that the building's occupancy permit did not allow residential use of the ground floor, the inspector confronted appellant and demanded that he permit an inspection of the premises. Appellant refused to allow the inspection because the inspector lacked a search warrant. The inspector returned on November 8, again without a warrant, and appellant again refused to allow an inspection. A citation was then mailed ordering appellant to appear at the District Attorney's office, and when he failed to appear a complaint was filed charging him with refusal to permit a lawful inspection in violation of §507 of the Housing Code. Appellant argued that §503 of the Housing Code was unconstitutional in that it violated and was contrary to the Fourth and Fourteenth Amendments, in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein. Section 503 provides as follows:

> "Authorized employees of the city departments of city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the city to perform any duty imposed upon them by the municipal code."

The Court observed the following:

"The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'"

"A search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

"We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, Frank differs from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral'. It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

"Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense and the fact of compliance is verified by a second inspection, again without a warrant. Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence."

"In our opinion, these arguments unduly discount the purposes behind a warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of

the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions that may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area."

"Yet, only by refusing entry and risking a criminal conviction, can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. *The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by requirement that a disinterested party warrants the need to search.*"

"In this case, appellant has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building, in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. No doubt, the inspectors entered the public portion of the building with the consent of the landlord, through the building manager, but appellee does not contend that such consent was sufficient to authorize inspection of appellant's premises."

Cf. *Stoner* v. *California*, supra; *Chapman* v. *United States*, 365 U.S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776; *McDonald* v. *United States*, supra. "Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a Constitutional right to insist that the in-

spectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." The judgment was vacated and the case was remanded for further proceedings.

The case of *See* v. *City of Seattle,* 18 L. Ed. 2d 943 (1967), was also decided upon the same basic facts as found in the Camara case. The Court said "In Camara, we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code enforcement inspection of his personal residence." The question in the *See* v. *Seattle* case was whether or not that doctrine would apply to inspections of commercial structures which are not used as private residences. The court held as follows:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."
>
> "We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises."

This court should strike down asserted consents to search for evidence of a crime whenever it discovers the defendant was caught "between the rock and the whirlpool." Whenever those unfortunate enough to become subjects of administrative searches by the Food & Drug Administration are confronted by a Notice of Inspection, they are faced with choices of interests. If they consent, they are subject to criminal prosecution after being subjected to a fishing expedition. If they refuse, they are subjected to harassment at the least and criminal prosecution at the most. As was held in *Garrity* v. *New Jersey,* 385 U.S. 493, 498:

"Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other."

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

CONCLUSION

In conclusion, this case should certainly be reversed for the reason that the Court committed clear error in not compelling the Government in the first instance to elect as between the four counts as originally charged in the Information. The rule of lenity should apply in determining the Congressional intent as to what Congress intended to be the element of the offense. Inasmuch as the cases and statutes state that the element of offense, upon the face of the statute, is in the act of holding food, and since the act of holding food is a continuous one, like selling bread on Sunday, like having more than one wife, like transporting two women across the state line in the same car, it would seem logical to state that the element of offense is the one single continuous act of holding adulterated food for sale after having been received in interstate commerce. It seems rather ridiculous that the element of offense should be the number of articles, the number of bags, the number of brand names, the number of pounds or whatever other arbitrary designation the Government could seize upon as defining an element of offense.

What is more significant in this case is that the inspection of the warehouse, upon the Notice served upon a lowly shipping clerk, was unlawful and not within the provisions of Section 374, a statute which has already been held as too vague for enforcement.

Also, it is clear that even assuming Gerald Council had the authority to consent to a search, that his consent was not real for the reason that if he took it upon himself to refuse the agents' admittance to the warehouse, because of the disparity of position and because of the agent's superior authority, the consent was not real and amounted to no consent at all.

Finally, Section 374 is unconstitutional inasmuch as it violates the tenor of the Fourth Amendment. Under the Camara case, no longer can administrative searches be justified such as to allow Government agents to search for the fruits of a crime under the guise of inspections, routine or otherwise.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25510

AKIN DISTRIBUTORS OF FLORIDA, INC.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

(July 29, 1968)

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

PER CURIAM: Akin, a wholesale food distributor, was convicted in a non-jury trial on all counts of a four-count information charging that appellant had received foods and allowed same to become adulterated within the meaning of Title 21, U.S.C., §342(a)(3) and (4), after such foods had been shipped in interstate commerce, in violation of Title 21, U.S.C., §331(k).

Appellant's first contention that the four counts of the information were duplicitous and that the district court should have sustained its motion to elect is without

merit. The counts are not identical since each count involved a different food.[1] *United States* v. *Justin M. Schneider*, Criminal No. 10170, E.D. Ky., December 31, 1959; *United States* v. *Direct Sales Company*, 252 F. 882 (W.D.N.Y. 1918). See also *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964). Though duplicity was not at issue, the Supreme Court in Wiesenfeld reversed the trial court's dismissal of an information similar to the one here.

Also, the fact that the evidence supporting the alleged adulteration of the food named in each count was different for each food further precludes a holding that the four counts were actually the same. *Bins* v. *United States*, 5 Cir. 1964, 331 F.2d 390; *Blockburger* v. *United States*, 284 U.S. 299 (1932).

Appellant also maintains that the evidence was the product of an illegal entry and search. As to the entry, there is ample evidence to support the trial court's determination that appellant's agent had sufficient authority to permit it. See *Golden Grain Macaroni Company, Inc.* v. *United States*, 9 Cir. 1953, 209 F.2d 166, for a similar determination. Likewise, it is undisputed that the agent's consent to the search was given freely and voluntarily.

AFFIRMED.

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1. Count one concerned whole wheat flour; Count two, white flour; Count three, wheat germ meal; Count four, soya flour.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 25510

D. C. Docket No. 67-63-Cr-J

AKIN DISTRIBUTORS OF FLORIDA, INC.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 29, 1968

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25,510

AKIN DISTRIBUTORS OF FLORIDA, INC.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

(December 11, 1968)

On Petition for Rehearing

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

PER CURIAM:

The Petition for Rehearing in the above entitled and numbered cause is ordered DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 980

AKIN DISTRIBUTORS INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 399 F. 2d 306.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3) was entered on July 29, 1968. A petition for rehearing was denied on December 11, 1968 (Pet. App. A4). Mr. Justice Black extended the time for filing

a petition for a writ of certiorari to February 9, 1969, and the petition was filed on January 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inspection of petitioner's warehouse where food was held for sale constituted an unreasonable search in violation of the Fourth Amendment.

2. Whether petitioner was properly charged with and convicted of four separate offenses.

STATEMENT

After a nonjury trial in the Middle District of Florida, petitioner was convicted on a four count information charging that it had violated 21 U.S.C. 331 (k) by allowing food which it was holding for sale, after shipment in interstate commerce, to become adulterated as defined in 21 U.S.C. 342(a)(3) and 342(a)(4), and was fined $500 on each count (R. 262). Each of the counts was based upon a different food—*viz.*, whole wheat flour received from Akin Distributors in Tulsa, Oklahoma (R. 4-5); white flour, received from the same source (R. 6); wheat germ meal, received from General Mills in Minneapolis, Minnesota (R. 8); and soya flour, received from El Molino Mills in Alhambra, California (R. 9).

The adulteration of the food was discovered during a three day inspection of petitioner's warehouse by two inspectors of the Food and Drug Administration and a food plant inspector of the Florida Department of Agriculture. On the first day, petitioner's manager

was not present (R. 87). The inspectors, after displaying their credentials and issuing a notice of inspection (R. 112, 122, 128-129, 265), were admitted by Gerry N. Council, who stated that he was the warehouse foreman and in charge in the manager's absence (R. 109, 128-129, 265). Council accompanied the inspectors on their inspection (R. 115). On the second and third day, the manager was present (R. 90, 98, 131-132). The inspectors showed him their credentials (R. 131), and he saw the notice of inspection which had been issued the first day (R. 92, 107). He raised no objection either to the inspection or to the taking of samples (R. 98-99, 131-132). He voluntarily signed a slip acknowledging the origin of each of the samples taken by the inspectors, and voluntarily instructed his subordinates to destroy the items found by the inspectors to be contaminated (R. 100-101).

Council's status was the subject of dispute at the hearing on petitioner's motion to suppress. The manager testified that Council was only a shipping clerk with neither managerial authority nor authority over the warehouse in the manager's absence and more specifically that he was not authorized to admit the inspectors (R. 82-83). On cross-examination, however, the manager acknowledged that while Council did not formally carry the title of warehouse foreman, he impliedly did (R. 96). Council testified that, after the man who formerly had been foreman had left his job, the manager told him that he was foreman, and that he had never had any doubts as to his position until he heard the manager testify (R. 109-111). Council further stated that, on the day

in question, the manager, before leaving told him to watch things (R. 113), and specifically instructed him to admit the inspectors if they came but to be sure to accompany them during their inspection (R. 112, 114, 120). The manager acknowledged that he was under instructions from the home office to permit inspections by the Food and Drug Administration and to assist and accompany the inspectors (R. 104), and that as a matter of policy any customer upon request would be shown around the warehouse and permitted to inspect it (R. 103). The inspectors at no time made any threats of any sort in order to obtain permission to conduct the inspection (R. 145).

ARGUMENT

1. The court of appeals correctly held that petitioner, through its agents (*i.e.*, Council and the manager), consented to the inspection. The evidence clearly supported a finding that Council had both authority and specific instructions to permit the inspection. Moreover, the manager—who clearly had authority to act for petitioner—ratified Council's initial permission by acquiescing in the inspection and cooperating with the inspectors on the second and third day. Compare *Golden Grain Macaroni Co.* v. *United States*, 209 F. 2d 166, 167 (C.A. 9).

Petitioner also contends that, in light of *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, the consent cannot be deemed voluntary because of the coercive effect of 21 U.S.C. 331(f) which makes it unlawful to refuse to permit entry or inspection. *Camara* and *See*, however, held only that

the owners of property sought to be inspected are privileged to refuse permission to inspect in the absence of a search warrant, and cannot be punished for such refusal. The two cases did not hold that a statute purporting to authorize such punishment *per se* vitiates an otherwise voluntary consent. To the contrary, in *Camara* the Court noted that the requirement of a warrant after refusal of entry is not burdensome because "most citizens allow inspections of their property without a warrant." 387 U.S. at 539. Here the inspectors made no effort to overbear the wills of either Council or the manager by threatening prosecution under § 331(f) if permission to inspect was withheld. There is no reason, therefore, to find the permission other than voluntary.

2. Petitioner contends that it was, in effect, convicted of only a single course of conduct—*i.e.*, permitting its refrigeration units to fall into disrepair and thus create a condition whereby food adulteration could result—and hence that its conviction and sentence on four separate counts was improper. Section 331(k), however, does not denounce the creation of a general contaminating condition, but rather "the doing of any * * * act with respect to a food" which "results in such article being adulterated * * *." Conviction under the statute thus requires a showing that an act (*e.g.*, storing under unsanitary conditions) was done "with respect to a food" which caused that food to become adulterated within the statutory definitions as set forth, *inter alia*, in §§ 342(a)(3) and 342(a)(4). See *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91. Manifestly, the deleteri-

ous result against which the statute protects increases in proportion to the number of separate articles of food which are acted upon in the forbidden way. Here the essence of the charges was not that petitioner allowed his refrigeration unit to fall into disrepair, but rather that he stored four separate shipments of food under such conditions that each became adulterated. It is irrelevant whether the four shipments were stored in the same area or in separate areas.[1] Thus, it was proper to charge petitioner separately with regard to each of the foods it allowed to become contaminated.

CONCLUSION

For the foreging reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] In fact, the foods named in the first two counts were stored in one cooler room (R. 170, 173) and the foods named in the last two in another (R. 175). The refrigeration unit in the first room had been broken down for a considerably longer period than the unit in the second room (R. 235).

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